No. 92-1625

In the Supreme Court of the United States

OCTOBER TERM, 1993

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, ET AL.,
PETITIONERS

v.

JOHN L. BAGWELL, ET AL.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether a court that adopts a prospective schedule of fines to coerce compliance with a "prohibitory" injunction may, upon violation of that injunction, impose those fines in a civil proceeding.

2. Whether a court's refusal to vacate civil contempt fines upon settlement of the underlying litigation renders those fines criminal in nature.

3. Whether the imposition of approximately $52 million in civil contempt fines is excessive as a matter of law, irrespective of the facts.

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INTEREST OF THE UNITED STATES

The Supreme Court of Virginia in this case upheld the use of a prospective schedule of civil contempt fines to coerce compliance with a "prohibitory" injunction, and held that the fines survived settlement of the underlying case and were not unconstitutionally excessive. Because of the vast range of its litigation, the United States is interested in the proper classification of sanctions as "civil" or "criminal." In addition, federal fines and forfeitures are subject to challenge as excessive. Finally, federal labor policy favors measures that promote the collective bargaining process and the peaceful settlement of labor disputes.

STATEMENT

1. On April 4, 1989, petitioners—the International Union, United Mine Workers of America, and its District

28—called a strike against respondents Clinchfield Coal Company and Sea "B" Mining Company (the Companies). Pet. App. 26a. The Companies continued operations with replacement workers.

On April 12, 1989, the Companies sued petitioners in Virginia state court, alleging that petitioners were committing unlawful acts in connection with the strike. Pet. App. 2a. On the following day, after an evidentiary hearing, the court issued an order which (as amended on April 21) enjoined petitioners, their agents, and members from, *inter alia*, obstructing ingress and egress at the Companies' facilities, throwing objects at persons employed by or performing services for the Companies, placing tire-damaging devices on roads, and picketing in greater than specified numbers. The injunction also required petitioners to use all lawful means reasonably available to ensure compliance with its terms, to place an agent at each picket site to supervise picketers' activities, and to report all violations to the court. *Id.* at 113a-121a.

Petitioners thereafter "engaged in wholesale violations of the court's injunction." Pet. App. 2a. Over the course of the strike, the violations grew to include numerous instances of violence, such as "gunfire directed at coal drivers' vehicles," *id.* at 5a, "physical beatings and death threats," *id.*, at 7a, rock-throwing, tire-puncturing, and other attempts to attack or intimidate company personnel, their families and members of the community. *Id.* at 4a-6a, 44a. On May 18, 1989, the court found that petitioners had committed 72 violations of the injunction since it was entered. The court responded by establishing a schedule of fines for future violations, under which a $100,000 fine would be levied for each violation involving violence, and a $20,000 fine would be levied for each day in which petitioners committed specified nonviolent violations. *Id.* at 4a, 111a.

Petitioners continued to violate the injunction notwithstanding the May 18 order. On June 7, 1989, following

a hearing, the court found beyond a reasonable doubt that petitioners had intentionally violated the injunction on a number of occasions, and it levied fines totalling $2,465,000 against them in accordance with the May 18 schedule. The court also substantially increased the fines for future nonviolent violations. Pet. App. 4a, 103a-105a.

Despite the steep increases in prospective fines, petitioners continued to disobey the injunction. The court accordingly cited petitioners for contempt on six separate occasions between June and November 1989—each time finding beyond a reasonable doubt that numerous violations had occurred—and it imposed fines generally in accordance with the revised schedule. Pet. App. 4a-7a, 55a-101a. Because petitioners "strenuously objected" to any payments to the Companies, and in light of the law enforcement pressures placed on the communities affected by the strike, the court ordered the bulk of the fines paid to the clerk of court for the benefit of the Commonwealth of Virginia and the two counties "most heavily affected by the unlawful activity." *Id.* at 44a-45a, 104a.

In January 1990, petitioners and the Companies reached an agreement settling their labor dispute. Pursuant to that agreement, petitioners and the Companies asked the court to dismiss the complaint and to vacate all contempt fines. In September 1990, the court dismissed the lawsuit, dissolved the injunction, and vacated the fines owed to the Companies. The court declined, however, to vacate the fines owed to the state and county governments, and it appointed respondent Bagwell as a special commisioner to collect them. Pet. App. 50a-52a. The court noted that petitioners' conduct had affected not only the Companies but also "members of the public * * * who had no connection with any of the litigants," and that state authorities had mobilized massive resources to cope with strike-related disturbances. *Id.* at 44a-45a. Because the contempt orders were issued in large part to safeguard the rights of the law-abiding public, and because the state entities who represented the public had

not consented to the settlement, the court declined to vacate any fines that were "payable in effect to the public." *Id.* at 44a-45a, 47a.

2. A divided panel of the Virginia Court of Appeals vacated all outstanding fines. Pet. App. 25a-37a. It observed that petitioners' violations of the injunction could "only be described fairly as massive," *id.* at 26a, and it assumed without deciding that the fines were civil, rather than criminal, in nature. *Id.* at 30a. Relying, however, on state-law principles (which it viewed as consistent with federal law), the court concluded that "civil contempt fines imposed during or as a part of a civil proceeding between private parties are settled when the underlying litigation is settled by the parties and the [trial] court is without discretion to refuse to vacate such fines." *Id.* at 36a.

3. The Supreme Court of Virginia reversed. Pet. App. 1a-20a. The court began by emphasizing the volume of undisputed evidence that established petitioners' contumacious behavior. *Id.* at 4a. The court then concluded that under Virginia law respondent Bagwell had standing, and the right to intervene as a party, to represent the interests of the state authorities in defending the validity of the fines. *Id.* at 7a-12a.

On the merits, the Supreme Court of Virginia first rejected petitioners' claim that the fines were criminal in nature, and that they therefore could be imposed only by following all of the procedures required by the Constitution in criminal proceedings. The court identified as the distinguishing feature of civil contempt in a case such as this the fact that the sanction is coercive—*i.e.*, that it is "conditional, and a defendant can avoid [it] by compliance with a court's order"—and rejected petitioners' contention that a civil contempt fine must in addition be imposed to bring about the performance of an *affirmative* act, rather than to ensure the non-occurrence of a *prohibited* act. Pet. App. 13a-15a.

The court next concluded that "the subject fines were not mooted by the parties' settlement of the underlying strike and litigation." Pet. App. 20a. The court observed that the mootness issue was "governed by state law," and explained that acceptance of petitioners' position would allow parties in petitioners' position to disobey coercive measures secure in the knowledge that ultimate settlement of the action would relieve them of liability. *Id.* at 17a. Finally, the court rejected petitioners' claim that the fines were so excessive as to violate substantive due process and federal labor policy. The court observed that, "considering [petitioners'] vast financial resources and the magnitude of the injunction violations we cannot say that [the fines] are excessive as a matter of law." *Ibid.*[1]

SUMMARY OF ARGUMENT

A. This Court has repeatedly recognized that the difference between civil and criminal contempt turns on whether the proceeding is primarily remedial, or primarily punitive. The Court has used the same test in determin-

[1] On May 16, 1989, the National Labor Relations Board (NLRB) filed an action against petitioners in federal court under Section 10(j) of the National Labor Relations Act (NLRA), 29 U.S.C. 160(j). That action, based on unfair labor practice charges filed against petitioners, resulted in the issuance on June 7, 1989, of an injunction against petitioners. When petitioners disobeyed that injunction, the district court held them in contempt and, like its state counterpart, adopted a schedule of fines applicable to future violations. *Clark* v. *International Union, UMWA*, 752 F. Supp. 1291, 1293-1294 (W.D. Va. 1990). Petitioners continued to violate the federal injunction repeatedly and, after several contempt hearings, the district court fined them a total of $960,000, payable to the United States. *Id.* at 1294-1295 & n.6. The NLRB and petitioners later settled the charges underlying the federal injunction. Petitioners then moved for an order vacating the fines, a motion that was granted only as to the fines imposed before the prospective fine schedule was announced. *Id.* at 1302. Petitioners appealed to the Fourth Circuit, but that appeal was dismissed by agreement of the parties and petitioners ultimately paid the fines in full.

ing whether legislatively imposed sanctions must be classified as civil or criminal—a defendant is entitled to the procedural protections required for criminal cases only if the sanction he faces amounts to "punishment" in the constitutional sense and cannot be justified as serving remedial ends. The "mandatory" or "prohibitory" character of a standard of conduct (whether that standard is announced by a court or enacted by a legislature) has never been thought dispositive on the criminal or civil nature of the proceedings under the Constitution. Because the fines imposed here were clearly designed to coerce petitioners into complying with remedial court orders, and because petitioners could easily have avoided those fines by complying with those orders, the fines were not punishment in the constitutional sense, and were properly imposable in civil proceedings.

B. That conclusion is not changed by the fact that the Virginia courts held that the civil contempt fines imposed here survived the settlement of the original controversy between petitioners and the Companies. Petitioners rely on *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911), for the proposition that settlement requires vacatur of previously imposed civil contempt fines, but that case turned on this Court's finding that the original controversy was moot under Article III of the Constitution, a provision that is not applicable to the States. In any event, no civil fines had actually been awarded in *Gompers*, and the only relief that could have been awarded was compensatory, not coercive. Since *Gompers*, this Court has explained that compensatory civil contempt fines must be vacated upon settlement, but that "the court's discretion is otherwise exercised" when the civil contempt fines are purely coercive. *United States* v. *United Mine Workers*, 330 U.S. 258, 304 (1947).

C. Petitioners have not shown that the fines imposed in this case are excessive as a matter of law under due process standards. Petitioners claimed in the Virginia

Supreme Court only that the fines were so large as to "jar the conscience," without attempting to offer particular reasons as to why that was so, or to support their claim by reference to the record. Because petitioners' argument amounted merely to a claim that the sheer size of the fines rendered them impermissible under any conceivable state of facts, it was correctly rejected. To the extent petitioners preserved any Eighth Amendment argument, it was framed in the same terms and it fails for the same reason.

ARGUMENT

THE CONTEMPT PROCEEDINGS AGAINST PETITIONERS WERE PROPERLY CHARACTERIZED AS CIVIL IN NATURE, AND THE RESULTING FINES DO NOT EXCEED CONSTITUTIONAL LIMITS

This case involves the remaining consequences of a contentious strike that was marked by petitioners' repeated violations of state and federal court injunctions. The labor dispute ultimately was settled between the parties, and the NLRB and petitioners settled the unfair labor practice charges arising out of the strike (see note 1, *supra*). Voluntary resolution of disputes is strongly favored in the law, as it serves not only the interests of parties but also those of judicial economy. See, *e.g.*, *Marek* v. *Chesny*, 473 U.S. 1, 5, 10 (1985); Fed. R. Civ. P. 68. That interest is especially strong in the labor field, where work stoppages can be enormously disruptive to the Nation's economy.

Federal labor policy favors collective bargaining as a peaceful means of resolving labor disputes. In order to promote that goal in the long term and as a general matter—and to facilitate restoration of ruptured collective bargaining relationships—it will often be appropriate for a court to reduce or vacate civil contempt fines that were imposed for violation of court orders entered during the heat of the dispute, especially if the parties concerned request that disposition. At the conclusion of the instant dispute, for example, although the NLRB did not join petitioners in asking that the civil fines entered by the

federal court be vacated, it did not oppose that action, and the special mediator appointed by the Secretary of Labor to assist in settling the labor dispute urged the state court to grant the joint motion filed by petitioners and the Companies to vacate all outstanding fines against petitioners. See J.A. 48-49.

At the same time, violence and other illegal conduct sometimes associated with strikes can be enormously disruptive to the public interest and the local communities involved, and courts considering whether to vacate or reduce fines already assessed and owing may properly be concerned with ensuring that such conduct is not encouraged in the future. These competing considerations are, in the end, addressed to the sound discretion of the court, informed by the views of the parties and the broader perspective and expert judgment of the public officials having responsibilities in the circumstances.

There is no occasion for the Court to consider in this case whether (or in what manner) principles of federal labor policy must inform the discretion of a state court in a case such as this, because petitioners have not argued that federal labor policy required the state court, at the conclusion of the underlying labor dispute, to vacate or reduce the fines it already had levied against petitioners. Similarly, although petitioners argued below that the fines were excessive as a matter of federal labor policy, the Virginia Supreme Court rejected that contention, Pet. App. 18a-19a, and petitioners have not renewed it in this Court. Petitioners have instead chosen to challenge the remaining fines only on constitutional grounds. The importance of those issues transcends this labor dispute, and their resolution may affect a broad variety of enforcement actions in such areas as labor relations and employee health, safety and economic security, in which the NLRB, Department of Labor and other agencies seek similar civil contempt fines.

While in the abstract "particular acts do not always readily lend themselves to classification as civil or criminal contempt," *McCrone* v. *United States*, 307 U.S. 61, 64 (1939), this case does not present any factual disputes that might render such classification difficult. Petitioners did not seek review of the factual findings of the Virginia courts, nor of those courts' conclusion that, on the facts presented by this record, petitioners were properly held liable for the conduct of their members. As the case comes to this Court, therefore, it must be assumed that, with full knowledge of the injunction and of the sanctions previously announced by the court, petitioners elected to engage in large-scale (and often violent) violations of the order. In our view, on the facts found by the Virginia courts, nothing in the United States Constitution precluded those courts from sanctioning petitioners' conduct in civil contempt proceedings and from retaining the fines in effect following resolution of the labor dispute and related litigation.

A. The Mandatory or Prohibitory Character Of A Court's Order Is Not Dispositive In Deciding Whether Violations May Result In Civil, Rather Than Criminal, Contempt Proceedings

1. This Court has long held that the distinction between civil and criminal contempt turns on the character and objective purpose of the action. See, *e.g.*, *Hicks* v. *Feiock*, 485 U.S. 624, 632-635 & n.7 (1988); *Shillitani* v. *United States*, 384 U.S. 364, 368 (1966); *Lamb* v. *Cramer*, 285 U.S. 217, 220-221 (1932). A sanction is civil if its purpose is primarily remedial. As the Court explained in *United States* v. *United Mine Workers*, 330 U.S. 258, 303-304 (1947):

> Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained. Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based

> upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.
>
> But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.

Accord *Shillitani* v. *United States*, 384 U.S. at 370; *Spallone* v. *United States*, 493 U.S. 265, 276 (1990). Criminal contempt, by contrast, is "a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both." *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968). In other words, criminal contempt is the exaction of retribution in "vindication of the public justice," *Fox* v. *Capital Co.*, 299 U.S. 105, 108 (1936), whereas civil contempt is "a sanction to enforce compliance with an order of the court." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).

This Court's cases thus establish that the key question in distinguishing civil from criminal contempt is whether the sanction at issue is properly characterized as primarily remedial or primarily punitive. The Court's opinion in *Shillitani* illustrates the point. In that case, the defendants were each sentenced to two years' imprisonment, with a proviso that those sentences would last only so long as the defendants continued to defy a court order that they testify before a grand jury. 384 U.S. at 365. The Court acknowledged that "any imprisonment, of course, has punitive and deterrent effects," but held that imprisonment "must be viewed as remedial if the court conditions release upon the contemnor's willingness to testify." *Id.* at 370. The Court therefore held that "the conditional nature of the[] sentences render[ed] each of the[] actions a civil contempt proceeding, for which indictment and jury trial [were] not constitutionally required." *Id.* at 365.

The Supreme Court of Virginia correctly concluded that the contempt fines in this case were civil under these principles. The trial court's orders—which established prospective schedules and then assessed fines for subsequent violations—were designed to compel petitioners' future compliance with its injunction. They were not an attempt to exact retribution for past conduct that society has made criminal. As in *Shillitani*, "if * * * petitioners had chosen to obey the order they would not have faced" the fines. 384 U.S. at 368. The conditional nature of the prospective fines demonstrates the civil nature of those fines when they were later assessed.

2. Petitioners contend (Br. 11-25) that the contempt sanctions at issue here must nevertheless be deemed criminal because the underlying injunction was "prohibitory"—it ordered petitioners to refrain from doing certain things. In petitioners' view, only a "mandatory" injunction—one that commands the performance of "an affirmative act"—may constitutionally be enforced through civil contempt. That "mandatory/prohibitory" dichotomy is claimed to have been established in *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911), and to have been followed in a line of precedent culminating in *Hicks* v. *Feiock*, 485 U.S. 624 (1988). In the contempt setting, however, "one who challenges the State's classification of the relief imposed as 'civil' or 'criminal' may be required to show 'the clearest proof' that it is not correct as a matter of federal law." *Id.* at 631. Petitioners have failed to carry their burden of showing that the distinction they advocate has been, or should be, adopted by this Court as a rigid test for distinguishing civil from criminal contempt.

a. While petitioners place great emphasis on the Court's reference to "an affirmative act" in *Gompers*, and the repetition of that language in *Hicks*, they wrest that language from the context in which it appears. That context suggests that the *Gompers* Court was emphasizing the traditional distinction between orders that are primar-

ily punitive and those that are remedial, including as the principal example of the latter category those that seek to coerce the defendant into complying with a court order. 221 U.S. at 443. Consistent with that approach, *Hicks* emphasizes that "[t]he critical feature that determines whether the remedy is civil or criminal in nature is * * * whether the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order." 485 U.S. at 635 n.7.

Indeed, far from supporting petitioners, *Gompers* disproves their claim that prohibitory injunctions cannot give rise to civil sanctions. The injunction at issue in *Gompers* was prohibitory—it ordered the defendants not to engage in boycott activities. 221 U.S. at 435-436. The injunction was not, however, coercive, because it did not specify in advance what sanction would follow a violation. The Court concluded that violations of that prohibitory injunction *could* support civil contempt, but that the only appropriate remedial action in the circumstances would have been "to impose a fine for the use of complainant, measured in some degree by the pecuniary injury caused by the act of disobedience." *Id.* at 444. The Court did not suggest, much less hold, that had the trial court earlier established a schedule of coercive fines in aid of the injunction, the subsequent imposition of those fines upon a violation would have been punitive rather than remedial.

Other cases also suggest that the distinction petitioners invoke lacks talismanic significance. In the leading case of *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324 (1904), on which *Gompers* extensively relied (see 221 U.S. at 441, 443, 444, 450, 452), the Court noted that criminal contempt is "like an ordinary crime which affects the public at large," 194 U.S. at 329, and contrasted it with civil contempt:

> On the other hand, if in the progress of a suit a party is ordered by the court *to abstain from some action* which is injurious to the rights of the adverse party, and he disobeys that order, he may also be guilty of contempt, but the personal injury to the party in whose favor the court has made the order gives a remedial character to the contempt proceeding.

Ibid. (emphasis added). See also *Maggio* v. *Zeitz*, 333 U.S. 56, 69 (1948) (civil contempt is "[t]he procedure to enforce a court's order commanding *or forbidding* an act") (emphasis added); *Leman* v. *Krentler-Arnold Co.*, 284 U.S. 448, 452-456 (1932) (civil contempt for violations of injunctions prohibiting patent infringement). And in *United Mine Workers*, the Court specifically approved the use of civil contempt fines to compel compliance with orders prohibiting the defendants from, *inter alia*, publicizing their claim that their employment agreement was no longer in force or otherwise interfering in any way with the operation of coal mines in the government's possession. 330 U.S. at 266 n.12, 269, 304-305. See also *Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 434-435, 442-443 (1986) (upholding, as civil, contempt fines imposed for violations of decrees prohibiting violations of civil rights laws); *McComb* v. *Jacksonville Paper Co.*, 336 U.S. at 191-192 (violations of FLSA's minimum wage, overtime, and record-keeping provisions).

Petitioners contend (Br. 20) that there is something specially "criminal" in the imposition of sanctions for completed violations of a *coercive* court order because, by the time the sanctions are imposed, the contemnor no longer has it within its power to avoid the sanctions altogether by complying with the court's order. That, however, is also true in analogous cases involving imprisonment as a civil sanction designed to coerce compliance with a court order, on which petitioners rely in asserting (Br. 18, 24) that the contemnors in civil contempt must always "carry the keys of their prison in their own pockets," *Hicks*, 485 U.S. at 633. As the federal district court pointed out in the parallel injunctive action brought against petitioners by the NLRB, although a person can avoid *future* imprisonment by complying with the order, whatever time he has already been imprisoned prior to compliance is "irretrievable." *Clark*, 752 F. Supp. at 1301.

Similarly here, although petitioners always retained the ability to avoid future fines by complying with the injunction, it does not follow that they must also at all times retain the authority to avoid, on a retroactive basis, coercive civil fines for which they have already been found liable. *Ibid.*

Moreover, while there are significant differences between compensatory and coercive civil contempt proceedings, see *United Mine Workers,* 330 U.S. at 303-304, the trait petitioners identify is common to both and brands neither as uniquely criminal. A compensatory civil contempt proceeding typically involves two steps: (1) the issuance of an order requiring certain conduct or forbearance, and (2) in the event of a violation, the exaction of compensation for the benefit of the injured party. A coercive contempt proceeding typically involves three distinct steps: (1) the issuance of the original court order, (2) in the event of disobedience of that order, the issuance of a second order finding the recalcitrant party in contempt and threatening to impose a specified fine or other sanction unless he purges the contempt, and (3) imposition of the threatened sanction if the purgation conditions are not fulfilled. See, *e.g., NLRB* v. *Blevins Popcorn Co.,* 659 F.2d 1173, 1184 (D.C. Cir. 1981). The last step of each proceeding—compensatory or coercive—is identical with respect to the contemnor's inability to avoid a penalty at that time. Because *Gompers* demonstrates that imposition of a fine as the last step of the former proceeding does not render it "criminal," there is no reason for a contrary conclusion with respect to the last step of the latter.

In light of the Court's teaching in *Gompers,* it is hardly surprising that the lower federal courts uniformly have rejected the contention that contempt fines, in order to be civil, must be perpetually subject to avoidance, even after they have accrued and been reduced to judgment. As the Ninth Circuit has explained:

> [I]nevitably, wherever a compliance fine is assessed and an opportunity [is] given to purge, the failure to purge will bring about a due date. The due date occurs because the actor has failed to use the key to the jail which the court provided. The occurrence of the due date does not transform civil proceedings, whose sole aim is to secure compliance, into a criminal proceeding. Were it otherwise, compliance with laws or orders could never be brought about by fines in civil contempt proceedings. Always the final order requiring payment will follow the act or omission which constitutes the failure to purge.

Hoffman v. *Beer Drivers & Salesmen's Local Union No. 888,* 536 F.2d 1268, 1273 (1976). Accord *NLRB* v. *Blevins Popcorn Co.,* 659 F.2d at 1185; *In re Grand Jury Proceedings,* 871 F.2d 156, 159 (1st Cir. 1989); *United States* v. *Darwin Construction Co.,* 873 F.2d 750, 754 (4th Cir. 1989); *United States* v. *Work Wear Corp.,* 602 F.2d 110, 115 (6th Cir. 1979).

b. The rigid mandatory/prohibitory distinction urged by petitioners is also inconsistent with the Court's cases distinguishing between civil and criminal sanctions in other contexts. The Court has repeatedly recognized that the government "may impose both a criminal and a civil sanction in respect to the same act or omission," *United States* v. *One Assortment of 89 Firearms,* 465 U.S. 354, 365 (1984), and has upheld the civil character of fines imposed for a breach of varied statutory prohibitions. See, *e.g., United States* v. *Ward,* 448 U.S. 242, 245, 249-250 (1980); *Rex Trailer Co.* v. *United States,* 350 U.S. 148, 150-152 (1956); *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, 548-551 (1943). Those cases, like the contempt cases addressing the same question, focus on whether the challenged sanction may be characterized as primarily punitive, not on whether the rule violated by the defendant is in some sense "prohibitory." Indeed, this Court has looked to the principles announced in its civil contempt cases for guidance in deciding whether restrictions qualify as "punishment" in other contexts. See *Selective Service System* v. *Minnesota Public Interest Research*

Group, 468 U.S. 841, 852-853 (1984) (quoting *Shillitani*, 384 U.S. at 368) (statute denying school aid to those who fail to register for draft is not punishment under Bill of Attainder Clause, because burden can be avoided by registering and thus students "carry the keys of their prison in their own pockets").

The basic rule that emerges from this Court's cases is that a State may impose a wide variety of burdens on its citizens (including, in appropriate cases, imprisonment) if it does so for remedial or regulatory reasons; a State is required to follow the constitutional procedures for criminal prosecutions only when it seeks to impose "'punishment' in the constitutional sense." *Bell* v. *Wolfish*, 441 U.S. 520, 535-537 & n.17 (1979); see also *United States* v. *Salerno*, 481 U.S. 739, 746-747 (1987); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 165-166 & n.20 (1963). Whether a sanction constitutes punishment in the constitutional sense is not to "be determined from the defendant's perspective," because "for the defendant even remedial sanctions carry the sting of punishment." *United States* v. *Halper*, 490 U.S. 435, 447 n.7 (1989); see also *Wolfish*, 441 U.S. at 538 n.19. Instead, the "punitive/regulatory distinction turns on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it." *Salerno*, 481 U.S. at 747 (brackets omitted); see also *Wolfish*, 441 U.S. at 538-539; *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960).

An order directing a litigant not to engage in specified conduct that is concededly harmful to others, coupled with a prospective schedule of fines to be imposed in the event of noncompliance, is rationally related to the nonpunitive objective of safeguarding the rights of third parties. It therefore does not "amount[] to 'punishment' in the constitutional sense." *Wolfish*, 441 U.S. at 537. That conclusion does not depend in any way on the mandatory or prohibitory character of the court's order. The relevant question is whether the fines are reasonably related to the

goal of securing compliance with a remedial decree. The Virginia courts determined that the fines in this case, while admittedly large, were reasonably necessary to compel compliance with the injunction. See Pet. App. 18a-19a. On the basis of that determination, the fines were remedial and properly imposable in a civil proceeding.

Petitioners further suggest (Br. 13-14 & n.4) that contempt sanctions occupy a special place in the constitutional analysis because judges dealing with contemptuous conduct act as prosecutors and judges of their own cause, and therefore may exercise their authority arbitrarily. While we do not quarrel with the proposition that judicial authority, like *all* authority, can be abused, we do not see how that concern supports the mandatory/prohibitory distinction advocated by petitioners. Indeed, stated at such an abstract level of generality, use of that proposition as a test of the civil or criminal nature of a proceeding would result in the elimination of all civil contempt proceedings, to say nothing of the use of summary criminal proceedings for contempts committed in the court's presence, see, *e.g.*, *United States* v. *Wilson*, 421 U.S. 309, 314-319 (1975), and the combination of prosecutive and adjudicative functions in administrative agencies, see, *e.g.*, *Withrow* v. *Larkin*, 421 U.S. 35, 53-54 (1975). To be sure, "we should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice," *id.* at 54, and a showing that the judge was actually biased would entitle a contemnor to a vacatur of any fines imposed. Cf. *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 820-825 (1986). We note, however, that while petitioners sought recusal of the trial judge on grounds of bias, that claim was resolved against them by the state courts, Pet. App. 19a-20a, and petitioners have abandoned it in this Court. As the case comes to this Court, then, it is governed by the general rule that state officials are assumed to be persons "of conscience and intellectual discipline, capable of judg-

ing a particular controversy fairly on the basis of its own circumstances." *Withrow*, 421 U.S. at 55.[2]

c. At bottom, petitioners' reliance on the mandatory/prohibitory distinction appears to rest on the premise (Br. 22-25) that criminal and civil contempt proceedings must be mutually exclusive, and that petitioners' purported "test" is needed to keep courts from invoking civil contempt in preference to its criminal counterpart. Petitioners' exclusivity premise is faulty. Like petitioners, we assume that their conduct could have been made the subject of criminal contempt proceedings. It does not follow, however, that the court was compelled by the United States Constitution either to invoke criminal contempt or do nothing at all. As the Court explained in *United Mine Workers*, "[c]ommon sense would recognize that conduct can amount to both civil and criminal contempt. The same acts may justify a court in resorting to coercive and to punitive measures." 330 U.S. at 298-299.

d. As this Court has recognized in other contexts, the distinction between mandatory and prohibitory injunctions is often "illusory." *California* v. *American Stores*

[2] Nor do we believe that a designation of the proceedings in this case as criminal is warranted by the claim that the law of crimes has always been a law of prohibitions coupled with noncompensatory penalties. See Pet. Br. 22-23. Much the same can be said about the law governing punitive damages for tortious conduct, in which the Court has declined invitations to apply the full panoply of procedures that are constitutionally required in criminal cases. See, *e.g.*, *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1043-1046 (1991). In any event, the significance of any analogy to criminal statutes is overstated. In cases like this one, a court order (whether mandatory or prohibitory) is generally entered only after a formal adjudication of a particular controversy (which gives the defendant far more notice of the bounds of permissible conduct than is usually provided by a criminal statute), and a determination that the specific public or private rights at issue require more immediate and certain protection than can be provided by the general deterrent effect of the criminal laws. Ensuring that protection in the specific case for the benefit of the affected party is properly viewed as remedial.

Co., 495 U.S. 271, 282-283 & n.9 (1990). In most cases, a court can easily frame a mandatory injunction that commands the performance of such affirmative acts as will ensure the non-occurrence of prohibited conduct.[3] To be sure, it might be said that a court can almost always frame an injunction in coercive terms as well. But the essence of our position is that the *form* of the injunction is not, and cannot be, *conclusive* on whether sanctions for its violation must be classified as criminal; in this area, as in others, the ultimate question is whether the sanctions are punishment in the constitutional sense. While a coercive fine nearly always will serve a remedial purpose, it remains open to any litigant to show that a particular fine is so extraordinarily disproportionate to the remedial purpose that assertedly justifies it as to be irrational—leading to the inference that the true purpose is the infliction of punishment. Cf. *Bell* v. *Wolfish*, 441 U.S. at 539 n.20; *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 476 (1977) ("Where such legitimate * * * purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged * * * was the purpose of the decisionmakers.").

e. Acceptance of petitioners' contention that the "mandatory/prohibitory" distinction provides a constitutionally required test for classifying contempts as civil or criminal would seriously hinder enforcement of numerous congressional policies reflected in labor and other regulatory statutes. For example, the NLRB's remedial orders often require employers and labor unions to cease and desist from engaging in specified unfair labor practices, and the NLRB is authorized to seek enforcement of those orders in the courts of appeals pursuant to Section 10(e) of the NLRA, 29 U.S.C. 160(e). As this Court has recognized, Congress anticipated that contempt reme-

[3] The distinction is especially elusive in this case, because petitioners' continuing pattern of violations of the injunction closely resembles the continuing failure by a defendant to comply with a mandatory injunction.

dies would be immediately available to the NLRB "in the event a renewal of the unfair practice occurs after the enforcement order." *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 569 (1950); see also *NLRB* v. *Warren Co.*, 350 U.S. 107, 112-113 (1955). Federal courts traditionally have responded to the renewal of previously enjoined unfair labor practices by imposing coercive, scheduled fines largely indistinguishable from those invoked by the state trial court in this case.[4] Because the great bulk of the NLRB's cease-and-desist orders may plausibly be characterized as "prohibitory," [5] acceptance of peti-

[4] *NLRB* v. *H & H Pretzel Co.*, 138 L.R.R.M. (BNA) 2888, 2893 (1990) (special master's report), adopted, 138 L.R.R.M. (BNA) 2976 (6th Cir. 1991) ($10,000 per violation); *NLRB* v. *Southwire Co.*, 801 F.2d 1252, 1259 (11th Cir. 1986) ($10,000 per violation); *NLRB* v. *Lehigh Lumber Co.*, 109 L.R.R.M. (BNA) 2213, 2221 (1981) (special master's report), adopted, 109 L.R.R.M. (BNA) 2290 (3d Cir. 1981) ($4000 per violation); *NLRB* v. *S.E. Nichols of Ohio, Inc.*, 592 F.2d 326, 327 (6th Cir. 1979) ($10,000 per violation); *NLRB* v. *Union Nacional de Trabajadores*, 611 F.2d 926, 934 (1st Cir. 1979) ($10,000 per violation); *NLRB* v. *Local 85, Teamsters*, 101 L.R.R.M. (BNA) 2933, 2935 (9th Cir. 1979) ($10,000 per violation); *NLRB* v. *Furtney d/b/a Mr. F's Beef & Bourbon*, 96 L.R.R.M. (BNA) 2191, 2202 (1977) (special master's report), adopted, 547 F.2d 575, 598 (D.C. Cir.), cert. denied, 431 U.S. 966 (1977) ($6000 per violation); *NLRB* v. *Schill Steel Products, Inc.*, 480 F.2d 586, 599 (5th Cir. 1973) ($5000 per violation); *NLRB* v. *Hickman Garment Co.*, 471 F.2d 611, 612 (6th Cir. 1972) ($5000 per violation); *NLRB* v. *Local 825, IUOE*, 430 F.2d 1225, 1230 (3d Cir. 1970), cert. denied, 401 U.S. 976 (1971) ($10,000 per violation); *West Texas Utilities Co.* v. *NLRB*, 206 F.2d 442, 449 (D.C. Cir.), cert. denied, 346 U.S. 855 (1953) ($30,000 per violation).

[5] We are informed by the NLRB that during the last five years, it has sought civil contempt sanctions for violations of its judicially enforced orders in approximately 88 cases. In 58 of those cases, the NLRB alleged violations of enforced cease-and-desist orders and sought imposition of a prospective fine schedule. In addition, during the same five-year period, the NLRB authorized 37 petitions for civil contempt of injunctions issued pursuant to Sections 10(j) and 10(*l*) of the NLRA, 29 U.S.C. 160(j) and 160(*l*), of which 30 involved contempt of prohibitory provisions. There are currently in effect more than 200 civil contempt orders—in which the court has directed the contemnor to cease and desist from specified con-

tioners' argument would in most cases remit the government to the criminal process for enforcement—a course that would completely nullify Congress's judgment that many labor problems require regulation by a specialized administrative agency.[6] This Court's cases do not require such a radical departure from current practices.[7]

Criminal sanctions are not lightly to be invoked, see *United States* v. *Lovasco*, 431 U.S. 783, 794-795 & n.15 (1977), and they carry awesome consequences when employed, for they subject those affected to particular opprobium within their communities. Not surprisingly, regulated parties ordinarily prefer that any enforcement action—including contempt proceedings—do not brand them as criminals. For these reasons, the Court has made clear that, in accordance with the principle of contempt law that "a court must exercise '[t]he least possible power adequate to the end proposed,'" *Shillitani*, 384 U.S. at

duct—that impose prospective fines in the event of future violations. In the case of egregious recidivist violators, the fines incurred can be as high as $300,000 for each violation.

[6] The Department of Labor likewise has informed us that it frequently obtains prohibitory injunctions to enforce the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, and the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.*, and that civil contempt fines have been assessed under prospective fine schedules to coerce compliance.

[7] Petitioners' theory would also produce radical, and unwarranted, changes in the conduct of other routine litigation. A state court adjudicating a dispute between land owners A and B might order A to remove a tree as a nuisance, while ordering B not to interfere with A's enjoyment of a second tree. Under petitioner's view, the court can enforce the decree civilly by imprisoning A until he has the tree removed if he does not voluntarily comply. With respect to B's correlative obligation not to interfere with A's enjoyment of the second tree, however, petitioner's view would prevent the court, *as a matter of federal constitutional law*, from compelling compliance through a civil contempt sanction. The court's only recourse would be a criminal contempt prosecution. The Constitution does not compel such a bizarre result.

371 (quoting *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821)), "[t]he judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate." *Shillitani*, 384 U.S. at 371 n.9; see also *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801 (1987). Petitioners' position stands that principle on its head, completely ruling out civil contempt fines in a case such as this and requiring a court, as a matter of federal constitutional compulsion, to resort to criminal contempt in the first instance in enforcing a decree.

3. In sum, petitioners' arguments fail to cast doubt on the correctness of the Supreme Court of Virginia's conclusion that the fines assessed against them were civil in nature. The conclusion reached by that court is in accord with the decisions of the federal courts of appeals that have held prospective fines for violation of prohibitory injunctions to be civil. See *Aradia Women's Health Center* v. *Operation Rescue*, 929 F.2d 530, 532-533 (9th Cir. 1991); *New York State NOW* v. *Terry*, 886 F.2d 1339, 1351 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990); *Latrobe Steel Co.* v. *United Steelworkers*, 545 F.2d 1336, 1343 n.27 (3d Cir. 1976); *Shakman* v. *Democratic Organization*, 533 F.2d 344, 349 n.7 (7th Cir. 1976); see also *Roe* v. *Operation Rescue*, 919 F.2d 857, 869 (3d Cir. 1990).

B. Failure To Vacate Previously Imposed Fines Upon Settlement Of The Original Controversy Does Not Render The Proceeding Criminal In Nature

Petitioners contend (Br. 25-37) that the fines imposed in this case, whatever their initial character, must now be deemed criminal because the state courts refused to vacate them after petitioners settled their differences with the Companies. In petitioners' view, *Gompers* compels the conclusion that settlement of the underlying dispute requires vacatur of any civil contempt fines, lest they become (retroactively) "criminal." While federal policy may sometimes favor vacatur or reduction of such fines,

nothing in *Gompers* suggests that the criminal or civil nature of the fines under the Constitution turns on whether they are vacated upon settlement.

1. *Gompers* held that civil contempt proceedings in federal court are part of the "original cause" in which they arise. In *Gompers*, the complainant had moved for an order to show cause and for "such other and further relief as the nature of its case may require," 221 U.S. at 448, but the trial court had not actually awarded any relief in the proceedings to the extent they were civil in nature; it instead had ordered the defendants imprisoned for a fixed term, which this Court found to be a criminal sanction, and awarded the complainant its costs in connection with those criminal proceedings. *Id.* at 425. Moreover, "the only remedial relief possible [in the future] was a fine payable to the complainant," measured by the extent of its injury. 221 U.S. at 444, 451. Thus, "when the main cause was terminated by a settlement of all differences between the parties, the complainant did not require and was not entitled to any compensation or relief of any other character" in civil contempt proceedings. *Id.* at 451-452. By its own terms, therefore, *Gompers* stands for the unremarkable proposition that a full settlement between the parties renders moot any pending claim for compensatory fines from the defendant. See *Krentler-Arnold Co.*, 284 U.S. at 453. That reading of *Gompers* is consistent with the fact that the Court had already refused on mootness grounds to entertain an appeal from the underlying injunction, 221 U.S. at 451, and with this Court's repeated references to *Gompers* as having been decided on mootness grounds. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 396 (1990); *United Mine Workers*, 330 U.S. at 294; see also *Trans International Airlines, Inc.* v. *International Brotherhood of Teamsters*, 650 F.2d 949, 955-957 & n.5 (9th Cir. 1980) (Kennedy, J.).

Especially in light of its narrow mootness rationale, *Gompers* does not assist petitioners. It is well settled that

"[t]he inability of the federal judiciary 'to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'" *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974) (quoting *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964)). It is equally well settled that "the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution." *Asarco Inc.* v. *Kadish*, 490 U.S. 605, 617 (1989). *Gompers* therefore would not have required the state courts to vacate the contempt fines on mootness grounds even if *Gompers* were analogous to the situation at bar.

2. In any event, *Gompers* is not analogous to this case, for three reasons. First, the trial court treated the Commonwealth and the two counties (which were affected by petitioners' violations of the injunction and were judgment creditors of petitioners under the contempt orders) as though they were parties whose failure to agree to the settlement distinguished this case from *Gompers*. Petitioners do not appear to challenge that ruling here.

Second, the contempt proceeding in this case was not primarily compensatory; it was primarily coercive. As the Supreme Court of Virginia correctly noted (Pet. App. 17a-18a), *Gompers* involved what would have been a purely compensatory use of civil contempt. This Court emphasized in *United Mine Workers* that when civil contempt is compensatory "the * * * fine is dependent upon the outcome of the basic controversy," but that "the court's discretion is otherwise exercised" when the contempt is coercive. 330 U.S. at 304. The Supreme Court of Virginia therefore did not err in concluding that *Gompers* did not require vacatur of the contempt fines in this case.

Third, as the district court pointed out in the parallel NLRB case, the civil contempt proceedings were still

pending in *Gompers*, and the trial court had not levied any civil contempt fines. *Clark*, 752 F. Supp. at 1300-1301. In this case (and the federal court case), by contrast, the relevant civil proceedings were completed, fines were actually assessed against petitioners, and those fines were reduced to separate, appealable judgments. Nothing in *Gompers* suggests that preexisting judgments of civil contempt must be vacated when the underlying civil action has been settled.

3. Petitioners' contrary view is based on two related propositions, neither of which is correct. The first is that civil contempt proceedings must necessarily benefit a private complainant, rather than the public at large or the government as their representative. Early cases did suggest that a contempt proceeding that benefitted the public or the government to any extent was necessarily criminal, *In re Christensen Engineering Co.*, 194 U.S. 458, 461 (1904); *FTC* v. *A. McLean & Son*, 94 F.2d 802, 804 (7th Cir. 1938), but this Court has since explicitly abandoned that view. *United Mine Workers*, 330 U.S. at 301-302 & n.79; *McCrone* v. *United States*, 307 U.S. 61, 63-65 & n.4 (1939).

The second proposition on which petitioners' argument rests is that any exaction that serves to vindicate the court's authority in any way must necessarily be criminal. See Pet. Br. 33. That argument is inconsistent with the well settled authority of courts to impose civil sanctions on litigants who abuse their processes. See, *e.g.*, Fed. R. Civ. P. 11; *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (dismissal of antitrust suit for "bad faith" discovery violations); *Chambers* v. *NASCO, Inc.*, 111 S. Ct. 2123, 2132-2136 (1991) (federal court has inherent authority, analogous to contempt power, to order losing party to pay nearly $1 million as sanction for bad faith conduct); see also *McComb* v. *Jacksonville Paper Co.*, 336 U.S. at 194-195. As the Court noted in *National Hockey League*, "here, as in other areas of the law, the most severe in the

spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." 427 U.S. at 643. Thus, even if the fines imposed on petitioners are viewed as vindicating the authority of the state courts, that fact would not require that they be classified as "criminal" for present purposes.

In any event, irrespective of whether vindication of a court's authority, standing alone, would qualify as a nonpunitive purpose that may properly be served in civil proceedings, the inquiry into the purpose served by contempt fines should not take place as of the time of settlement, but at the time when the trial court adopts the coercive fine schedules. The fines were remedial when the trial court announced them prospectively in order to safeguard the rights of the Companies and of the public, and petitioners' obligation to pay them became fixed when they thereafter disobeyed the court's orders and the court liquidated petitioners' liability by entering appropriate judgments of contempt. The later settlement of the underlying controversy could not retroactively change the character of petitioners' obligation, any more than such a settlement could retroactively turn a previously served imprisonment for civil contempt into the infliction of unconstitutional "punishment" for which petitioners might be entitled to compensation, cf. *Davis* v. *Passman*, 442 U.S. 228, 233-248 (1979); 42 U.S.C. 1983—or any more than a subsequent settlement would retroactively change the character of coercive fines already paid into the State's fisc, so as to require the State to disgorge them. In this area, as in others, "the moving finger writes; and, having writ, moves on." *United States* v. *Mechanik*, 475 U.S. 66, 71 (1986). Nothing in *Gompers*, or any other precedent of this Court, requires the conclusion that civil contempt sanctions, whether they be fines or imprisonment, must not only serve remedial ends when they are initially invoked, but must also be independently remedial at every point in time thereafter, in perpetuity.

C. Petitioners Have Not Shown That The Civil Contempt Fines Imposed In This Case Are Constitutionally Excessive As A Matter Of Law

Petitioners' final claim is that the fines imposed in this case are so large as to violate the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment. This Court has held that certain exactions, while not " 'punishment' in the constitutional sense," *Bell* v. *Wolfish*, 441 U.S. at 537, may sufficiently serve retributive and deterrent values that due process imposes some limitations on their size, and requires special review of the procedures by which they are obtained. The principal example is punitive damages for tortious conduct. *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1044 (1991). The Court has also concluded that some civil forfeiture proceedings, while not punitive enough to require a jury trial or most other procedures mandated for criminal cases, see *Austin* v. *United States*, 113 S. Ct. 2801, 2804-2805 n.4 (1993), serve deterrent and retributive purposes that make application of the Excessive Fines Clause appropriate. *Id.* at 2806. Because the Court has often stated that civil contempt sanctions serve some punitive purposes, see, *e.g.*, *Gompers*, 221 U.S. at 441, we assume that the Excessive Fines Clause and the due process protections applicable to punitive damage awards apply to civil contempt sanctions as well. As the case comes to this Court, however, the limited challenge raised by petitioners lacks merit.

1. In advancing their due process argument in the Supreme Court of Virginia, petitioners relied solely on a conclusory claim that the sheer amount of the total fines levied for their course of conduct "jar[red] the conscience." Brief for Appellant at 22, *UMW* v. *Clinchfield Coal Co.*, No. 92-0299; Brief of Appellees at 44, *Bagwell* v. *UMW*, No. 91-0634.[8] They did not present the court

[8] Petitioners filed two briefs in the Supreme Court of Virginia, one as appellees in respondent Bagwell's appeal from the decision of the Court of Appeals (which covered only a part the contempt fines), and another in their own appeal from the trial court's deci-

with any further arguments concerning the factors that might bear on the impermissibility of the fines, either singly or in the aggregate, or attempt to demonstrate by reference to the record that the fines were not sufficiently related to the advancement of legitimate state interests. Judicial review of monetary awards by trial and state appellate courts provides a primary safeguard against constitutional claims of excessiveness. See, *e.g.*, *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2720 (1993) (plurality opinion); *id.* at 2727 (Scalia, J., concurring); *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. at 1045. In our view, the furnishing by a State of fair procedures for the review of such claims imposes a correlative obligation on litigants raising them to make some attempt to establish by reference to the record precisely *why* the monetary award is claimed to be excessive. As raised in the Virginia Supreme Court, petitioners' due process argument amounted to a contention that the mere size of the total award rendered the fines excessive as a matter of law under the Due Process Clause, irrespective of the facts of the particular case. The Virginia Supreme Court properly did not accept that "facial" challenge to the fines. Pet. App. 18a-19a.

Even in this Court, petitioners do not present the Court with any detailed argument in support of their claim that the fines violate the Due Process Clause. See Br. 37-38, 40. For this reason, we shall merely identify several pertinent considerations in the event the Court nevertheless chooses to address the issue in greater detail. First, although petitioners (Br. 38) fault the trial court for not calibrating the amount of the fines to the "harm caused" or "specific harms caused," it also would be relevant to consider the *potential* harm that petitioners' conduct might have caused. See *TXO*, 113 S. Ct. at 2721-2723 (plurality opinion). Second, although respondents suggest (Br. 38) that the only purpose of coercive fines in this setting is to "vindicate the trial court's authority and the 'rule of law' under the circumstances," such fines, as we have explained (see pages 12-17, *supra*), serve the important remedial purpose of protecting the rights of the complainant and third parties. Third, although petitioners note that the Supreme Court of Virginia relied in part on the extent of the Union's resources (albeit without identifying the amount, see Pet. App. 18a), they do not suggest that factor is irrelevant in establishing a schedule of coercive fines. Cf. *TXO*, 113 S. Ct. at 2722 n.28 (plurality opinion); *Pacific Mutual*, 111 S. Ct. at 1045. Finally, it is appropriate to consider the duration of the wrong and the degree of the defendant's fault. See *Pacific Mutual*, 111 S. Ct. at 1045; Pet. App. 19a.

sion on the balance of the fines (a case that the Supreme Court of Virginia certified and consolidated for argument with Bagwell's appeal).

2. In pressing their claim that the fines violate the Excessive Fines Clause, petitioners rely principally on *Austin*. That case, however, does not help petitioners, for two reasons. First, it does not appear that the Eighth Amendment claim was either pressed or passed upon below—and, accordingly, that petitioners preserved it for review.[9] See, *e.g.*, *TXO*, 113 S. Ct. at 2723-2724 (plural-

[9] When a State's highest court fails to pass on a federal question, this Court will "assume[] that the omission was due to want of proper presentation * * *, unless the aggrieved party in this Court can affirmatively show the contrary." *Street* v. *New York*, 394 U.S. 576, 582 (1969). Petitioners' argument based on the Eighth Amendment was even more limited than their due process contention. Neither of petitioners' briefs in the Virginia Supreme Court raised the Excessive Fines Clause of the Eighth Amendment under the "Questions Presented" for review. See Brief for Appellant at 4-5, *UMW* v. *Clinchfield Coal Co.*, No. 92-0299; Brief of Appellees at 7, *Bagwell* v. *UMW*, No. 91-0634. In addition, the entirety of petitioners' argument on the Eighth Amendment in both briefs was a single conclusory sentence without any citation of authority—which in one of the briefs appeared in a footnote—tacked onto the end of the due process argument: "By a parity of reasoning, the fines imposed are so unreasonably large as to violate the excessive fines clause of the Eighth Amendment." Brief for Appellant at 23 n.16, *UMW* v. *Clinchfield Coal Co.*, No. 92-0299; Brief of Appellees at 45,

ity opinion); *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 77-80 (1988); cf. *Browning-Ferris Indus.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276-277 (1989). The proper presentation rule is especially important in this case, because the Court cannot reach the merits of petitioners' claim without deciding the logically antecedent question of whether the Excessive Fines Clause is binding on the States—a question left open by this Court in *Browning-Ferris*, 492 U.S. at 276 n.22. Second, to the extent petitioners preserved any Eighth Amendment claim, they limited its scope to that of their due process argument—in effect, that the fines, by virtue of the sheer amount, were barred by the Eighth Amendment as a matter of law. Because fines of the magnitude imposed here are not barred by the Eighth Amendment in all circumstances, that claim must fail on the merits as well.

CONCLUSION

The judgment of the Supreme Court of Virginia should be affirmed.

Respectfully submitted.

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Bagwell v. *UMW*, No. 91-0634. The Virginia courts do not appear to consider such a fleeting reference to be adequate to preserve an issue for review; indeed, even errors that are specifically assigned are waived if they are not briefed. See Va. Sup. Ct. R. 5:27; *Mueller* v. *Commonwealth*, 422 S.E.2d 380, 385 (Va. 1992), cert. denied, 113 S. Ct. 1880 (1993).

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